Local Union No. 3, International Brotherhood of Electrical Workers, AFL–CIO *and* Teknion, Inc. Case 29–CC–1267

September 30, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On June 17, 1999, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in support of the judge's decision and an answering brief. The General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Local Union No. 3, International Brotherhood of Electrical Workers, AFL–CIO, Flushing, New York, its officers, agents, and representatives, shall take the action set forth in the Order.

Scoff B. Feldman, Esq., for the General Counsel.
Norman Rothfeld, Esq., for the Respondent.
Stephen J. Sundheim, Esq. (Pepper Hamilton, LLP), for the Charging Party.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. However, in affirming the judge's discrediting of the testimony of Respondent's business representative, Howard Cohen, we do not rely on the judge's consideration of, inter alia, the Respondent's history of violating Sec. 8(b)(4). Further, in adopting the judge's refusal to draw an adverse inference from the General Counsel's failure to call any witnesses to corroborate the testimony of the Charging Party's director of sales, Chris Stevenson, regarding the October 14, 1998 meeting, we emphasize that the proper inquiry in determining whether an adverse inference may be drawn from a party's failure to call a potential witness, as explicated in *International Automated Machines*, 285 NLRB 1122, 1123 (1987), is whether the witness may reasonably be assumed to be favorably disposed to that party.

[2] In adopting the judge's recommended broad remedial order, we rely particularly on the fact that as recently as July 1996, the Respondent consented to entry of an order by the Second Circuit Court of Appeals requiring the Respondent to comply with its obligations under prior outstanding court judgments and not to further violate Sec. 8(b)(4) of the Act. The Respondent's violation of Sec. 8(b)(4)(ii)(B) in the instant case, just a little more than 2 years later, sufficiently demonstrates that the Respondent has a proclivity for violating the Act, and thus warrants our adoption of the judge's recommended broad order.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. This case was tried in Brooklyn, New York, on May 11, 1999. The charge was filed by Teknion, Inc. on October 14, 1998,[1] and the complaint was issued January 12, 1999. The complaint alleges that the Respondent, Local Union No. 3, International Brotherhood of Electrical Workers, AFL–CIO, violated Section 8(b)(4)(ii)(B) of the Act, on or about October 14, by threatening three neutral employers with a work stoppage with the object of threatening, restraining, or coercing these employers in order to cause one of them to cease using, selling, handling, transporting, or otherwise dealing in the products of, and to cease doing business with, the Charging Party. The Respondent filed its answer to the complaint on January 22, 1999, denying the alleged unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the arguments made by the parties at the hearing and in their briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Charging Party (Teknion), a corporation located in Mariton, New Jersey, markets and manufactures modular office workstations. Teknion annually purchases and receives at its New Jersey facility goods and supplies valued in excess of $50,000 directly from entities located outside the State of New Jersey. Securities Industry Automation Corporation (SIAC), a corporation, provides communication automation services in support of business activities from its facility in Brooklyn, New York, where it annually purchases and receives goods and supplies valued in excess of $50,000 directly from entities located outside the State of New York. The Respondent amended its answer at the hearing to admit that the Charging Party and SIAC are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

James G. Kennedy & Company, Inc. (Kennedy), a corporation located in New York, New York, is a general contractor in the construction industry and annually purchases and receives at its New York facility goods and supplies valued in excess of $50,000 directly from entities located outside the State of New York. PEM, Inc. (PEM), a corporation located in Long Island City, New York, is engaged in the construction industry as an electrical contractor and annually purchases and receives at its New York facility goods and supplies valued in excess of $50,000 directly from entities located outside the State of New York. The Respondent did not admit, deny, or otherwise answer these allegations of the complaint, effectively admitting them.[2]

Accordingly, based on the admissions of the Respondent, I find that the Charging Party, SIAC, Kennedy, and PEM are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find, based on the Respondent's failure to admit, deny, or otherwise answer the allegation, that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates are in 1998 unless otherwise indicated.
[2] NLRB Rules and Regulations, Sec. 102.20.

II. ALLEGED UNFAIR LABOR PRACTICES

In the fall of 1998, Kennedy was the general contractor and PEM the electrical subcontractor on a construction project for SIAC, referred to in the record as the Renaissance Plaza project. Part of that project involved the installation of office workstations manufactured by the Charging Party. These workstations are sold with prefabricated wire harnesses and receptacles that can be snapped together at the site. This feature of the Charging Party's product allows the purchaser to reconfigure its office space after installation by simply disconnecting the prefabricated wiring, moving the individual workstations to the desired location, and reconnecting them in a new configuration by snapping the wires together again. Someone using these modular workstations can also easily add new outlets for additional electronic equipment by snapping additional outlets into the workstations. The prefabricated wire harnesses and receptacles are assembled by the Charging Party's nonunion employees.

Under the terms of its contract with Kennedy, PEM employees would complete the electrical installation of the Charging Party's workstations by snapping the wire harnesses and outlets together at the site. The employees of PEM have been represented by the Respondent for a number of years. The General Counsel alleges that, at a meeting on October 14, the Respondent's business representative, Howard Cohen, threatened Kennedy and PEM with a work stoppage in order to force them to put pressure on SIAC to cease using the products manufactured by, and to cease doing business with the Charging Party. There is no allegation that any work stoppage ever occurred.

There is no dispute that a telephone conversation occurred on October 9 between Cohen and the Charging Party's executive vice president, Brian Schatzinger. Schatzinger testified that he initiated this call after receiving a report from the SIAC project indicating that there had been a work stoppage by members of the Respondent. According to Schatzinger, he asked Cohen why the electricians had stopped working at SIAC. Cohen replied that it was a "theft of labors," telling Schatzinger that "this is work that his men could be doing." Cohen then asked Schatzinger if he was with Teknion in 1991. When Schatzinger said that he was, Cohen told him that he should be familiar with the fact that the Union did the work then and that they should be doing it now. According to Cohen, Schatzinger asked him in this conversation what the problem was "with the partitions, with the wiring," on the SIAC job. Cohen acknowledged telling Schatzinger that he felt it was electricians' work. Cohen denied that Schatzinger asked him if there was a work stoppage and he further denied any knowledge that there ever was a work stoppage at SIAC.

It is also undisputed that a meeting took place on the SIAC jobsite on October 14. Cohen had requested this meeting with representatives of SIAC, Kennedy, and PEM for the specific purpose of discussing installation of the Teknion workstations. John McCarthy-O'Hea, Kennedy's project manager for the job, and two representatives of PEM, John and Richie, whose last names are unknown, were at this meeting. Although invited, no one from SIAC attended the meeting. Chris Stevenson, the Charging Party's director of sales, did attend the meeting even though the Charging Party had not been invited. Only Stevenson and Cohen testified at the hearing about this meeting and, as to be expected, their versions of what was said differ.

Stevenson testified that Cohen said at this meeting that his men were not going to install Teknion's electric harnesses, that this was work that he felt the Charging Party was stealing from the Union and that this was adding to their unemployment. According to Stevenson, Cohen said that he felt that the Union could manufacture the wiring onsite and hard wire the workstations.[3] Stevenson testified that he and McCarthy-O'Hea discussed Cohen's statements after the meeting and then went to SlAC's of ices across the street to inform Mike Anderson, SlAC's employee in charge of the project, what had happened at the meeting. Anderson is no longer employed by SIAC and did not testify at the hearing.

Cohen denied saying that the Respondent's members would not install the Teknion harnesses and he denied mentioning unemployment in the Union. According to Cohen, he merely stated his opinion that the workstations should be "field-wired" by electricians, as historically done. He acknowledged describing the Charging Party's prefabricated wiring as a "theft of our work." Cohen further acknowledged that he asked the Kennedy representative to present the Union's case to SIAC, with the hope that SIAC would agree with the Union and have the electricians field-wire the workstations.

The record reveals that 2 days after this meeting, McCarthy-O'Hea sent SIAC a change order that would have PEM hard-wire the workstations. The change order would cost SIAC almost $23,000, including an additional $20,860 to be paid to PEM to hard-wire the workstations instead of installing them as originally planned. The record further reveals that SIAC returned the prefabricated wiring to the Charging Party in December for a credit of $21,419.84. There is no dispute that the job was completed with the workstations hard-wired by members of the Respondent, as requested by Cohen at the October 14 meeting.

In order to determine whether the Respondent violated Section 8(b)(4)(ii)(B) on October 14, as alleged in the complaint, I must answer three questions: (1) What did Cohen say at the October 14 meeting? (2) Does whatever he said amount to a "threat, restraint or coercion" within the meaning of Section 8(b)(4)(ii)? and (3) If so, what was the object of Respondent's action? See *Sheet Metal Workers Local 27 (AeroSonics, Inc.),* 321 NLRB 540, 547 (1996).

The first question turns on a credibility resolution with respect to the conflicting testimony of Stevenson and Cohen. The Respondent argues that Stevenson should not be credited because his testimony was uncorroborated, because it was inconsistent with his pretrial affidavit and because he was "less than candid" regarding his failure to bring contemporaneous notes with him to the hearing. The Respondent further argues that an adverse inference should be drawn from the General Counsel's failure to call any other witnesses who were at the meeting. While it is true that Stevenson's testimony is uncorroborated, the same is true of Cohen's testimony. The other individuals who were at the October 14 meeting were equally available to the General Counsel and the Respondent and, because they are not parties in this proceeding and were neutral in the dispute between the Charging Party and the Re-

[3] Hardwiring the workstations would require the electricians to run wire from the main power source in the building to each workstation and separately wire each receptacle. Because the wire would run through several workstations on the way from the power source to an outlet, it would be more difficult to re-configure the workstations in the future.

spondent, it cannot be said that they would be predisposed to testify favorably to one side or the other. Under these circumstances, an adverse inference is not warranted. *Queen of the Valley Hospital*, 316 NLRB 721 fn. 1 (1995); *Laborers Local 190 (ACMAT Corp.)*, 306 NLRB 93 (1992); and *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

The claimed inconsistency between Stevenson's testimony at the hearing and his pretrial affidavit was insignificant. In his pretrial affidavit, Stevenson stated that Cohen said at the October 14 meeting that the Union "was not going to install Teknion's harnesses based on the fact that it was work that could be done by the Union." At the hearing, Stevenson recalled Cohen saying that the Union's members were not going to install Teknion's "components" because it was work Cohen felt Teknion was stealing from the Union and that it was adding to the Union's unemployment. The gist of the statements attributed to Cohen by Stevenson, in both his affidavit and on the witness stand, is that the Respondent's members were not going to handle the Charging Party's products, whether called harnesses or components, because of a claim to the work. The slight variation at the hearing does not warrant a conclusion that Stevenson was not truthfully attempting to recall what transpired at the meeting. Similarly, I find that Stevenson's explanation for not bringing his notes to the hearing was reasonable and sufficiently "candid" and that there was no attempt to conceal exculpatory evidence.

Although Stevenson's testimony was not corroborated by other witnesses, it was corroborated by actions taken shortly thereafter by others who were at the meeting. Within days, SIAC had changed its plans to use the Charging Party's prefabricated wiring. Instead, it elected to have the workstations hard-wired by PEM's employees represented by the Respondent, at a considerable increase in cost and at the expense of future flexibility in reconfiguring the workstations. This is precisely the result sought by Cohen in requesting the meeting. I find it highly unlikely that SIAC would have chosen such a course of action in response to a simple expression of opinion by Cohen that the work should be done this way.

In evaluating the respective credibility of Stevenson and Cohen, I have also considered the Respondent's history of violating Section 8(b)(4).[4] In light of the Respondent's well-documented resort to unlawful secondary activity in pursuit of claimed work, I find it unlikely that Cohen would have expressed his "opinion" regarding who should be wiring the workstations without backing up his arguments with the threat to withhold the labor needed to finish the installation of these workstations. I also note that Cohen admitted at the hearing that he viewed the Charging Party's prefabricated wiring as a "theft of our work," lending credence to the testimony of Schatzinger and Stevenson that Cohen used a similar expression in his conversations with them on October 9 and 14, respectively .

Based on the above, and considering the demeanor of the witnesses, I find that Stevenson's version of the October 14 meeting is the more credible and that Cohen did tell those at the meeting that the Respondent's members would not install the Charging Party's workstations with the prefabricated wiring. I further find that such a statement constituted conduct proscribed by Section 8(b)(4)(ii) of the Act because it was a threat that the Respondent would induce or encourage its members employed by PEM on the SIAC job to refuse to handle the Charging Party's products. Although it was an employee of the Charging Party who provided the evidence that such a statement was made, the threat was clearly directed at PEM, the contractor employing its members, and there is no dispute that PEM was present when the statement was made. Because PEM was under contract to Kennedy, which likewise had a contract with SIAC, the threat was clearly intended to put pressure on Kennedy and SIAC as well to get them to change the planned installation of the Charging Party's products in order to use the Respondent's members to hard-wire or field-wire the workstations. Cohen admitted that this was his purpose in asking to meet with Kennedy, PEM, and SIAC on October 14. Cohen's statement thus falls within the ambit of Section 8(b)(4)(ii) even if the statement was ostensibly directed only at Stevenson. See *Tri-State Building & Construction Trades Council (Blackman Sheet Metal Works)*, 272 NLRB 8 fn. 1 (1984), enfd. 781 F.2d 569 (6th Cir. 1986); and *Iron Workers Local 40 (Spancrete Northeast)*, 249 NLRB 917, 920 fn. 12 (1980).

Finally, I find that the object of Cohen's threat at the meeting, to get SIAC to change from using the Charging Party's prefabricated wiring to having the workstations field-wired, was an illegal secondary one. The Respondent's primary dispute here was with Teknion over who would wire Teknion's workstations, Teknion's nonunion employees who worked in the factory where the workstations were prewired, or the Respondent's members who did the electrical installation work in the field. The Respondent clearly had no dispute with SIAC, the purchaser of these workstations, Kennedy, the contractor doing the office construction, or PEM, the electrical subcontractor on the job. This is clear from Cohen's statements to Schatzinger and Stevenson that it was the Charging Party who was "stealing" the Respondent's work. Thus, the Respondent's efforts to cause SIAC to stop using the Charging Party's prefabricated wire harnesses and receptacles was an illegal attempt to enmesh neutral employers in its primary dispute with Teknion, *Sheet Metal Workers Local 27 (AeroSonics, Inc.)*, supra; and *Sheet Metal Workers Local 104 (Losli International, Inc.)*, 297 NLRB 1078 (1990).

Accordingly, I find that the Respondent has violated the Act as alleged in the complaint.

CONCLUSIONS OF LAW

1. Teknion, SIAC, Kennedy, and PEM are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening Kennedy and PEM, on October 14, that the Respondent's members employed by PEM would not install Teknion's workstations with prefabricated wiring, in order to cause Kennedy and PEM to pressure SIAC to cease using, selling, handling, transporting, or otherwise dealing in the products of, and to cease doing business with Teknion, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(ii)(B) and Section 2(6) and (7) of the Act.

[4] The Board and the courts have held that consideration of such background evidence is appropriate in evaluating a respondent's current conduct, as well as for determining an appropriate remedy. *NLRB v. Electrical Workers Local 3 (Northern Telecom)*, 730 F.2d 870, 879 (2d Cir. 1984).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel has requested a broad cease-and-desist order in this proceeding based on the Respondent's history of violating Section 8(b)(4) of the Act. In 1988, the Second Circuit Court of Appeals stated that the Respondent had been found to violate Section 8(b) of the Act at least 23 times since 1960. *NLRB v. Electrical Workers Local 3 (Telecom Plus)*, 861 F.2d 44, 45 (2d Cir. 1988). The court cited from its earlier decision in *NLRB v. Electrical Workers Local 3 (Northern Telecom)*, 730 F.2d at 880, in which it had called the Respondent "an incorrigible secondary boycotter with a 2-decade long history of secondary boycott activity." As recently as July 1996, the Respondent consented to entry of an order by the Second Circuit requiring the Respondent to comply with its obligations under outstanding court judgments and not to further violate Section 8(b)(4) of the Act. Based on the evidence before me, it appears that the Respondent has not yet learned its lesson. Because the Respondent has a proclivity for violating the Act, I agree with the General Counsel that a broad order is appropriate here. *Sheet Metal Workers Local 104 (Losli International, Inc.)*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Local Union No. 3, International Brotherhood of Electrical Workers, AFL–CIO, Flushing, New York, its officers, agents, and representatives, shall

1. Cease and desist from in any manner or by any means, threatening, coercing, or restraining Securities Industry Automation Corporation, James G. Kennedy & Company, Inc., REM, Inc., or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Securities Industry Automation Corporation, or any other person, to cease using, selling, handling, installing, transporting, or otherwise dealing in the products of Teknion, Inc. or any other producer, processor or manufacturer, or to cease doing business with each other, Teknion, Inc., or any other person.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its union office in Flushing, New York, and at other places where it customarily posts notices to members in New York, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT in any manner or by any means, threaten, coerce, or restrain Securities Industry Automation Corporation, James G. Kennedy & Company, Inc., PEM, Inc., or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Securities Industry Automation Corporation, or any other person, to cease using, selling, handling, installing, transporting, or otherwise dealing in the products of Teknion, Inc., or any other producer, processor, or manufacturer, or to cease doing business with each other, Teknion, Inc., or any other person.

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."